Rechelulk v. Tmilchol, 2 ROP Intrm. 277 (1991)

RAFAILA RECHELULK,
Appellant,

v.

BECHESERRAK TMILCHOL and B.T. COMPANY,
Appellees.

CIVIL APPEAL NO. 20-88
Civil Action No. 145-86

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: May 9, 1991

Attorney for Appellant: John K. Rechucher

Attorney for Appellees: Johnson Toribiong

BEFORE: MAMORU NAKAMURA, Chief Justice; ARTHUR NGIRAKLSONG, Associate Justice; FREDERICK J. O'BRIEN, Associate Justice.

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NAKAMURA, Chief Justice.

Procedural History

Plaintiff-appellant filed her complaint on July 23, 1986, alleging that defendants' building encroached upon her real property. Defendants answered on September 11, 1986, generally denying the allegations in the complaint.

On January 7, 1988, plaintiff filed a motion for summary judgment. Defendants filed a cross-motion for summary judgment on January 18, 1988. Plaintiff moved to strike defendants' cross-motion and all opposition pleadings and documents on February 16, 1988.

Judgment was rendered in defendants' favor on September 9, 1988, and docketed September 12, 1988.

Plaintiff's notice of appeal was filed October 10, 1988.

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Facts

This lawsuit stemmed from a boundary dispute involving a piece of land called Nangkairo, located in Dngeronger, Koror State, Republic of Palau. The suit was decided by summary judgment in favor of defendants/appellees.

Appellant argued that her natural mother, Merii Dirradai, owned Lot No. 984, as shown in the Koror Tochi Daicho. Appellant maintained that her mother sold 338 *tsubo* of the northern portion of Lot 984 to Asao Asanuma in 1957, and that the portion she sold to him was thereafter known as Lot No. 984-B, and called Nangkairo. Appellant could recall no known written document memorializing this transaction, nor any contemporaneous sketch or drawing, and acknowledged that the Merii Dirradai-Asao Asanuma transaction was never recorded.

⊥279 When Asao Asanuma died, Lot No. 984-B passed to his wife Sechedui, by Palauan custom. Sechedui quitclaimed her interest in Lot No. 984-B to her son, Kazuo Asanuma, on August 14, 1962. This transfer was recorded May 21, 1963, with the Clerk of Courts in Book VII, page 112. The quitclaim deed describes the lot thusly:

> The area of the land is 338.21 sq. ft. (sic) bounded to the north by the land leased under Mr. Kodep, and east by public road, to the south by the land of Mr. Rechuldak, and to the west by Government land.

On September 9, 1974, Merii Dirradai transferred to her daughter, appellant Rafaila Rechelulk, the portion of the original lot which she had retained (and which was still identified as Lot No. 984). This transfer was recorded on September 9, 1974, at the Clerk of Courts, in Book XIV, page 76. Merii Dirradai died a few years later.

Kazuo Asanuma sold Lot No. 984-B to Gregorio Ngirausui on August 18, 1979. This transaction was noted in Book XVII, page 53. The document described Lot No. 984-B as that

> . . . Parcel of real property, known as NANGKAIRO, comprising an area of 338 tsubos, located in Koror Municipality . . . .

Gregorio Ngirausui in turn sold Lot No. 984-B to appellees, Bechesserak Tmilchol and B.T. Company, on October 11, 1983. This transaction is recorded in Book XIX, page 48. Again, Lot No. 984-B was described as "a parcel of real property, known as NANGKAIRO, comprising an area of 338 Tsubo . . . ."

As appellant notes, none of the transactions involving Lot No. 984-B refers to specific boundaries for Nangkairo or makes reference to the original transfer from Merii Dirradai to Asao ⊥280 Asanuma by which Nangkairo (Lot No. 984-B) came into existence.

Sometime in 1986 appellees began constructing an office building which appellant claimed encroached upon her property by some 25 feet. When the parties could not agree upon

the correct boundary line between Lot No. 984 and Lot No. 984-B this lawsuit was filed.

At a pre-trial conference held in May of 1987 the two parties, and the trial court, agreed that none of the transfer instruments appearing in the chain of title adequately described the boundary lines of Lot No. 984-B. But, all parties did agree that, whatever the boundaries, Nangkairo was 338 *tsubo* in size and they further agreed that a survey should be conducted. It was believed by all parties that since the size of the lot was known, and the north, east, and west boundary lines were known, it would be possible to determine the remaining boundary line: that between Lot 984 and Lot 984-B.

Pursuant to court order, a survey was thereafter undertaken by the Palau Land and Survey Office, certified, and filed with the Court. The survey bore out appellant's contention that appellees' building encroached upon her land approximately 25 feet and she filed her motion for summary judgment.

Soon thereafter appellees filed a cross-motion for summary judgment and supported it with a previously unknown or unrevealed document. This "mystery document," as appellant dubbed it, purported to be a copy of the original deed transferring title to the 338 *tsubo*, which came to be known as Lot No. 984-B or Nangkairo, from Merii Dirradai to Asao Asanuma. Attached to the "deed" was a drawing purporting to identify all the boundary ⊥281 lines to Nangkairo. After a hearing was held, the court granted appellees' cross-motion for summary judgment.

Issue

Did the Trial Division properly grant defendants' cross-motion for summary judgment or did there exist genuine issues of material fact which precluded judgment as a matter of law?

Standard of Review

A grant of summary judgment is reviewed de novo, with all evidence and inferences viewed in the light most favorable to the nonmoving party, to determine whether the trial court correctly found that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law. *Kraus v. County of Pierce (Wa.)* , 793 F.2d 1105, 1106-1107 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 1569 (1987); *Water West, Inc. v. Entek Corporation* , 788 F.2d 627, 628-29 (9th Cir. 1986). This test is applied in such a way as to give the party who defended the motion the benefit of any doubt as to the propriety of granting summary judgment. Wright, Miller & Kane, 10A *Federal Practice and Procedure: Civil* , Section 2716, p. 634 (2d Ed. 1983).

Analysis

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party ⊥282 is entitled to judgment as a matter of law." ROP R. Civ. Pro. 56; Fed. R. Civ. P. 56.

Cross-Motions

In this matter, there were cross-motions for summary judgment. However, "the fact that both parties simultaneously are arguing that there is no genuine issue of fact does not establish that trial is unnecessary[.]" Wright, Miller & Kane, 10A *Federal Practice and Procedure: Civil*, Section 2720, pp. 17-18 (2d Ed. 1983). Further,

> Cross-motions are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination whether genuine issues of material fact exist. If any such issue exists it must be disposed of by a plenary trial and not on summary judgment.

Rains v. Cascade Industries, Inc., 404 F.2d 241, 245 (3rd Cir. 1968).

Types of Evidence Considered

The particular forms of evidence mentioned in Rule 56 are not the exclusive means of presenting evidence to support a motion; the court may consider any material that would be admissible at trial. *See, generally*, Wright, Miller & Kane, 10A *Federal Practice and Procedure: Civil*, Sections 2721-2724, pp. 40-75 (2d Ed. 1983) (including, for example, a proxy statement identified in a separate attached affidavit; a computer print-out; an exhibit of sales data accompanied by an affidavit of the person who completed it; affidavits authenticating personal correspondence; ⊥283 oral evidence; exhibits; certified documents; and, stipulations). *See, also*, 6 Pt. 2 *Moore's Federal Practice*, Section 56.11 [l.-8] (including concessions of counsel, certified court transcripts or administrative records, or exhibits and other papers that have been identified by affidavit or otherwise have been made admissible).

Affidavits

Rule 56(e) requires in part that supporting affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Affidavits are ex parte documents. The affiant is not subject to cross-examination and his or her demeanor cannot be evaluated by the trier of fact. Therefore, an affidavit should be scrutinized with particular care to evaluate its probative value and to determine whether it complies with the standards enunciated in Rule 56 as to form and content; that is, has it been made on personal knowledge, does it set forth such facts as would be admissible in evidence, and does it show affirmatively that affiant is competent to testify to the matters stated therein. These requirements are mandatory. *See, e.g., Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 70

S.Ct. 894, 896 (1950).

Here, at the pre-trial conference held in May, 1987, the parties at least implicitly agreed that there existed no written instrument memorializing the original transaction between Merii Dirradai and Asao Asanuma. Further, the parties explicitly agreed that, since Nangkairo was 338 *tsubo* in size, and since three of ⊥284 the four boundaries were known, the final boundary could be determined by a survey. It was not until after the survey was completed (and supported appellant's claim of encroachment) that appellees produced a document purporting to be a true copy of the original deed between Merii Dirradai and Asao Asanuma, and a map, purporting to be contemporaneous to the deed, supporting appellees' contention that their building did not encroach on appellant's land.

The first affidavit, dated January 18, 1988, and signed by appellee Becheserrak Tmilchol, refers solely to statements supposedly made to affiant by Mr. Gregorio Ngirausui. This affidavit utterly fails to comport with the technical requirements of Rule 56(e) regarding personal knowledge, admissible evidence, and an affirmative statement as to the competency of affiant to testify at trial. The averments are based exclusively on hearsay and it is, therefore, wholly incompetent to support the motion for summary judgment.

The second affidavit is also deficient. This affidavit, by Masao Esebei and also dated January 18, 1988, identifies affiant as an employee of the Division of Lands and Surveys. In it, Mr. Esebei challenges the very survey done at the order of the court, and in the preparation of which he purportedly participated. In this affidavit, Mr. Esebei states he was given, presumably by appellees or their attorneys, a copy of the purported deed of transfer between Merii Dirradai and Asao Asanuma, dated May 8, 1957, and that he then calculated the boundaries and size of Nangkairo. He stated that the map accompanying this 1957 deed "clearly indicates" the distances for all boundary lines. The ⊥285 fact that the size of Nangkairo, using these "clear boundaries," is 23 *tsubo* short of the 338 *tsubo* size that all parties have always agreed is correct, is "in his (sic) opinion" a "slight discrepancy in terms of computing the surface area for a lot of that configuration as computed in 1957." This affidavit, too, must fail. First, affiant has no knowledge of the provenance of the purported deed and map. For all he knew, they were rank forgeries and the mere fact that he employed them while undermining the original court-ordered survey by, in effect, conducting his own, does not "authenticate" them. Second, affiant offers opinion evidence which, in itself, renders at least that portion of the affidavit incompetent, since it is not personal knowledge of a fact. Also, this is the very type of statement which cries out for the opportunity for cross-examination. Affiant stated under oath that an error of almost seven percent in the surface computation of a lot was a"slight discrepancy" in terms of the skill of surveyors in 1957. Upon what personal knowledge is this conclusion based, and what would its uncritical acceptance portend for future boundary disputes?

Finally, this affidavit also fails to conform to the technical requirements of Rule 56(e).

While it is true that any formal defects in affidavits are waived in the absence of a motion to strike or other objection, *see, e.g., Scharf v. United States Attorney General* , 597 F.2d 1240, (9th Cir. 1979); 6 Pt.2 *Moore's Federal Practice* § 56.22[1], p. 56-761, here appellant did move

to strike. And, although the affidavits themselves were not mentioned specifically in the motion, the clear import of the motion, as was forcefully stated ⊥286 by appellant below, was to strike all of the newly-found "evidence" presented by appellees. Even were this not so, the defects in the two affidavits cannot be characterized as merely "formal." The issue was preserved for appeal.

Documents, Oral Testimony, Judicial Notice, and Presumptions

Rule 56 provides that summary judgment "shall be rendered . . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. . . ."

Appellees supported their cross-motion for summary judgment with photocopies of a document purporting to be a deed, with an attached map.

The U.S. Court of Appeals for the Ninth Circuit holds that unauthenticated documents, even when attached to an affidavit, are inadmissible hearsay. *United States v. Dibble* , 429 F.2d 598, 601-602 (9th Cir. 1970) (to be admissible, documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e), and the affiant must be a person through whom the exhibit could be admitted into evidence.) While the instant matter does not require that we adopt such a blanket prohibition, it appears to be the wiser course. Here, it is sufficient to note that neither the "deed" nor the appended map were ever filed with the Clerk of Courts, either at the time of the transfer in 1957, or up to the date they were produced. Nor are they authenticated in any manner, whether by certification or contemporaneously-executed affidavit. There is nothing in the record on appeal which in any way sheds light on the provenance ⊥287 of these documents. Neither of the witnesses to the 1957 deed was produced (if, indeed, either is still alive). Given these circumstances, we find that the purported deed could not be used for purposes of summary judgment, since it was not at that juncture admissible evidence.

As appellant points out, discovery of the new map was uncommonly fortunate for appellees, since it placed the boundary in such a way that the building does not encroach. Also, appellant notes that to accept this map as drawn would be to require that one also accept that appellant's mother, when she transferred the land now known as Nangkairo, intentionally denied herself access to the public road. Finally, the Court notes that the signature of Merii Dirradai as it appears on the purported 1957 deed differs markedly from her signature as it appears on the 1974 deed of transfer to appellant. The Court draws no conclusions from these seeming anomalies, other than to note that they reinforce our belief that summary judgment was improvidently granted.

Rule 43(e) provides that oral testimony may be received at a hearing on a summary judgment motion. It appears from the record on appeal that none was given at the hearing.

The court also may utilize judicial notice and presumptions substantially as they would be used at trial. *See*, 6 Pt.2 *Moore's Federal Practice* § 56.11[1.-8]. The presumptions accorded appellees were error in that they were not supported by admissible evidence.

⊥288 Conclusion

Based on the foregoing analysis, the decision of the Trial Division is REVERSED and this matter is REMANDED for further proceedings consistent with this Opinion.